



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 30, 1995

Ms. Sandra C. Joseph
Open Records Counsel/Disclosure Officer
Office of the Comptroller of Public Accounts
L.B.J. State Office Building
111 East 17th Street
Austin, Texas 78774

OR95-015

Dear Ms. Joseph:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 27928.

The Comptroller of Public Accounts (the "comptroller") has received two requests for information relating to the requestor's termination. Specifically, the requestor seeks her master personnel file; her auxiliary personnel file for the period she worked in Austin; her auxiliary personnel file for the period she worked in Corpus Christi; and the notes of meetings with witnesses concerning sexual harassment charges filed against her. You have submitted the requested information to us for review and claim that this information is excepted from required public disclosure under sections 552.101 and 552.103 of the Government Code.

Section 552.103(a) excepts from required public disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 (1990) at 5. Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551, at 5; 511 (1988) at 3. A surmise that litigation will occur is not enough; there must be some concrete evidence pointing to litigation. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989) at 5; 328 (1982). This office has concluded that a reasonable likelihood of litigation exists when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, *see* Open Records Decision No. 551, and when a requestor hires an attorney who then asserts an intent to sue, *see* Open Records Decision No. 555 (1990).

Your assertion of section 552.103(a) is based on the requestor's requests for information and "a letter demanding reimbursement for attorney's fees which she has incurred and will continue to incur." While the requestor has made a claim for reimbursement for attorney's fees incurred and to be incurred, the submitted records do not indicate that the requestor has threatened litigation in the event that the comptroller refuses to make reimbursement. You also base your assertion of section 552.103(a) on your belief that "litigation may [be] reasonably anticipated and that the requested information is related to the litigation over Ms. Halvorson's termination." Although the submitted documents clearly indicate the existence of a dispute between the comptroller and the requestor, you do not explain how litigation may be reasonably anticipated in this instance. Section 552.103(a) does not apply merely because a governmental body has received a request for information relating to a dispute by a person involved in the dispute, even if the requestor is an attorney. *See* Open Records Decision No. 361 (1983). We conclude that you have failed to explain why litigation in this instance is pending or reasonably anticipated. Accordingly, the comptroller may not withhold the requested information under section 552.103(a) of the Government Code.

Some of the requested information falls within the protection of common-law privacy and thus must be withheld from required public disclosure under section 552.101 of the Government Code, which excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You claim that the information submitted to us for review is protected by the doctrine of common-law privacy. Information may be withheld from required public disclosure under common-law privacy if it meets the criteria articulated for section 552.101 by the Texas Supreme

Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.); *see also* Open Records Decision No. 441 (1986). Under *Industrial Foundation*, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing *and* it is of no legitimate concern to the public. Although information relating to a disciplinary action against a public employee may be highly intimate or embarrassing, the public generally has a legitimate interest in knowing the reasons why such an action was taken. *See* Open Records Decision No. 444 (1986). In Open Records Decision No. 579 (1990), this office held that common-law privacy did not apply to witness names and statements regarding allegations of sexual misconduct.

Recently, however, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Id.* The court held that the nature of the information, *i.e.*, the names of witnesses and their detailed affidavits regarding allegations of sexual harassment, was exactly the kind specifically excluded from disclosure under privacy doctrine as described in *Industrial Foundation*. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of these documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

You have submitted to us for review several statements in which employees of the comptroller's office detail complaints of sexual harassment. We conclude that the identity of the complainants and witnesses detailing the allegations of misconduct and any information that tends to identify the complainants and witnesses are excepted from disclosure by the common-law privacy doctrine as applied in *Ellen*. However, section 552.101 of the Government Code in conjunction with common-law privacy or the court's holding in *Ellen* does not protect the remainder of the submitted information. We have marked the type of information that you must withhold under section 552.101. The remainder of the requested information, however, must be released in its entirety.¹

¹We note that some of the submitted information, *e.g.*, personnel financial information, implicates the requestor's common-law right to privacy. *See* Open Records Decision Nos. 600 (1992); 545 (1990); 373 (1983). While this information may not be made available to the public at large, the requestor has a special right of access to it under section 552.023 of the Government Code. *See also* Open Records Decision No. 481 (1987).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Loretta DeHay". The signature is written in a cursive, flowing style.

Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/GCK/rho

Ref.: ID# 27928

Enclosures: Marked documents

cc: Ms. Lori Halvorson
107 Clarks Grove Lane
Hutto, Texas 78934
(w/o enclosures)